

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

11	DONALD D. STONE,)	
12	Plaintiff,)	No. CV-04-3041-CI
13	v.)	ORDER GRANTING PLAINTIFF'S
14	JO ANNE B. BARNHART,)	MOTION FOR SUMMARY JUDGMENT
15	Commissioner of Social)	AND REMANDING FOR AN IMMEDIATE
16	Security,)	AWARD OF BENEFITS
17	Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 18, 20), submitted for disposition without oral argument on October 11, 2005. Attorney Tom Bothwell represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands for an immediate award of benefits.

Plaintiff, 55-years-old at the time of the administrative

1 decision, filed an application¹ for Social Security disability
2 benefits in November 2001, alleging disability as of October 1,
3 1998, due to Meniere's Syndrome, arthritis, low back pain, hearing
4 loss and tinnitus. (Tr. at 15 - 16.) Plaintiff, who completed two
5 years of college but did not earn a degree,² had relevant past work
6 as a career counselor in the military (23 years of active duty
7 service) and also as a long haul trucker and janitor / security
8 guard. (Tr. at 16.) Following a denial of benefits at the initial
9 stage and on reconsideration, a hearing was held before
10 Administrative Law Judge Verell Dethloff (ALJ). The ALJ denied
11 benefits; review was denied by the Appeals Council. This appeal
12 followed. Jurisdiction is appropriate pursuant to 42 U.S.C. §
13 405(g).

14 ADMINISTRATIVE DECISION

15 The ALJ concluded Plaintiff met the non-disability requirements
16 for a period of disability and was insured for benefits through
17 December 31, 1998, three months after the alleged onset date.
18 Plaintiff had not engaged in substantial gainful activity and had
19

20 ¹Prior applications, filed in 1996 and November 2000, were
21 denied and not pursued. The ALJ accorded res judicata effect to the
22 reconsideration determination of August 22, 1996. (Tr. at 15.)
23 There was no administrative record available for the November 2000
24 application.

25 ²Plaintiff's college course was made possible through a
26 veteran's vocational training program; he became ineligible for the
27 benefits ten years after his discharge in 1987 and after he was
28 found disabled by the VA. (Tr. at 370, 371.)

1 severe disorders, including Meniere's, hearing loss, and
2 osteoarthritis, but those impairments were not found to meet the
3 Listings. The ALJ rejected Plaintiff's testimony as not credible
4 and also rejected the disability finding by the Veteran's
5 Administration. (Tr. at 24.) Relying on the consulting physician,
6 the ALJ concluded Plaintiff retained the residual capacity to
7 perform medium work with additional limitations including exposure
8 to hazards and unprotected loud noise. Those limitations were not
9 found to preclude his past work as career counselor, a sedentary
10 position. Alternatively, based on the testimony of the vocational
11 expert, the ALJ found Plaintiff had transferable skills and could
12 perform other work which exists in significant numbers in the
13 national economy. (Tr. at 22.) Thus, the ALJ found there was no
14 disability.

15 ISSUES

16 The question presented is whether there was substantial
17 evidence to support the ALJ's decision denying benefits and, if so,
18 whether that decision was based on proper legal standards.
19 Plaintiff asserts the ALJ erred when he improperly rejected (1) the
20 VA disability finding, (2) the opinion of the treating physician,
21 (3) the testimony of the vocational expert, and (4) Plaintiff's
22 testimony.

23 STANDARD OF REVIEW

24 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
25 court set out the standard of review:

26 The decision of the Commissioner may be reversed only if
27 it is not supported by substantial evidence or if it is
28 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
1097 (9th Cir. 1999). Substantial evidence is defined as
being more than a mere scintilla, but less than a

preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy" 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from

1 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
2 404.1512(a)-(b), 404.1513(d)).

3 ANALYSIS

4 Plaintiff first contends the ALJ improperly rejected the VA
5 assessment of 70% disability effective November 15, 1994. (Tr. at
6 166.) The VA considered outpatient treatment reports from February
7 1988 to July 1989, a VA examination conducted on July 17, 1995;
8 Department of Transportation physical examination report dated June
9 30, 1994; letters from John P. Redman, Jr., dated May 10, 1995, Gary
10 W. Duncan, dated May 17, 1995, Joseph S. Strafford, dated May 8,
11 1995, and Dr. Laidlaw, dated August 22, 1994; VA Form 9, Appeal to
12 the Board of Veterans Appeals; and review of the claim file. The
13 rating decision (Tr. at 148) noted disability was warranted due to
14 Meniere's, secondary hearing loss with chronic dizziness and gait
15 disturbance. (Tr. at 167.) As a result of his impairments,
16 Plaintiff lost his driver's license and was unable to work as a
17 trucker. He was also fired from his job as a janitor / security
18 guard because he was unable to perform his duties. (Tr. at 372.)

19 VA disability was based 60% on Meniere's with secondary hearing
20 loss and tinnitus, and 10% due to a skin condition of the forearms,
21 disabling from June 18, 1993. (Tr. at 168.) Plaintiff argues, under
22 the *McCartey* decision, great weight must be given to the VA
23 disability determination. Defendant contends the ALJ correctly
24 assessed the VA disability finding because the VA made no effort to
25 determine Plaintiff's residual capacity to perform other work, but
26 simply found disability on his inability to perform work as a
27 trucker. Additionally, Defendant contends the VA assessment was
28 inconsistent with the overall medical record.

1 In *McCartey v. Massanari*, 298 F.3d 1072 (9th Cir. 2002), the
2 Ninth Circuit addressed the issue of the weight to be given to a VA
3 disability assessment. In that case, the claimant was awarded a 70%
4 disability rating by the VA. Under *McCartey*, a VA rating of
5 disability will not necessarily compel a finding of disability as to
6 Social Security benefits, 20 C.F.R. § 404.1504, but the ALJ must
7 consider the VA's finding in reaching his decision. *Id.* at 1076.
8 As noted further:

9 Both programs evaluate **a claimant's ability to perform**
10 **full-time work in the national economy on a sustained and**
11 **continuing basis**; both focus on analyzing a claimant's
12 functional limitations; and both require claimants to
13 present extensive medical documentation in support of
14 their claims. Compare 38 C.F.R. § 4.1 et seq. (VA ratings)
15 with 20 C.F.R. § 404.1 et seq. (Social Security
16 Disability). Both programs have a detailed regulatory
17 scheme that promotes consistency in adjudication of
18 claims. Both are administered by the federal government,
19 and they share a common incentive to weed out meritless
20 claims. The VA criteria for evaluating disability are very
21 specific and translate easily into SSA's disability
22 framework. Because the VA and SSA criteria for determining
23 disability are not identical, however, the ALJ may give
24 less weight to a VA disability rating if he gives
25 **persuasive, specific, valid reasons for doing so that are**
26 **supported by the record.** See *Chambliss v. Massanari*, 269
27 F.3d 520], at 522 [(5th Cir. 2001)] (ALJ need not give
28 great weight to a VA rating if he "adequately explain[s]
the valid reasons for not doing so").

20 *McCartey*, at 1076 (emphasis added). Thus, Defendant's argument the
21 VA considered only Plaintiff's ability to perform work as a truck
22 driver is not consistent with VA standards.

23 Here, the ALJ noted:

24 I have considered the Veterans Administration findings
25 regarding disability. Of some note, claimant worked after
26 the most recent of these documents (compare 16E and 7D).
27 In any event, the standards of adjudication are not the
28 same and this determination is not controlling on Social
Security adjudications. In light of the analysis of this
decision and the application of Social Security rules and
regulations, deference to this decision would be
inappropriate.

1 (Tr. at 24.) Only one specific reason was given by the ALJ for
2 rejecting the VA decision and that is a reference to Plaintiff's
3 work history following the effective date of VA disability, November
4 15, 1994.

5 A review of those exhibits reveals Plaintiff had reported
6 Social Security earnings in 1995 of \$5,219; in 1996 of \$5,498; and
7 in 1997 of \$5,500. (Tr. at 78.) There are no reported earnings for
8 1998, 1999, or 2000. Thus, there were earnings after the effective
9 date of VA disability, but prior to the Plaintiff's alleged Social
10 Security benefits onset date of October 1998. There are
11 inconsistent reports of work history as to the trucking and care
12 taking occupations. On one report, Plaintiff noted he worked as a
13 long haul trucker from June 1989 to June 1994; and as a custodian
14 for Washington State from August 1995 to November 1995. (Tr. at 81,
15 89.) On a second report, he notes he worked as a long haul trucker
16 from June 1988 to June 1995 and for the State of Washington from
17 August 1995 to January 1996. (Tr. at 89.) On the third and fourth
18 reports, he notes long haul trucking from March 1989 to June 1994;
19 and security guard/caretaker for the state from July 1995 to January
20 1996. (Tr. at 99, 108.) No jobs were reported after January 1996;
21 thus, there is an inconsistency between reported earnings in 1996
22 and 1997 and job history.³ However, there is no evidence Plaintiff
23 worked after the VA's notification of his disability in May 1996 and
24 the alleged onset date of this application--October 1998. Thus,
25 this court is unable to conclude the ALJ's reason for rejecting the

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27 ³Military disability benefits are tax free and not reported as
28 income for social security tax purposes. (Tr. at 146.)

1 VA award--that Plaintiff had work activity after receiving the
2 benefits--was not supported by the record. There are no other
3 persuasive, specific, and valid reasons for rejecting the VA
4 determination. Thus, the Commissioner's decision must be reversed
5 and remanded. *McCartey*, at 1075.⁴

6 This court has discretion to remand a case either for
7 additional evidence and findings or for an award of benefits. *Smolen*
8 *v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Immediate benefits
9 may be awarded if the record is fully developed and further
10 administrative proceedings would serve no useful purpose. *Id.* Such
11 a circumstance arises when: (1) the ALJ has failed to provide
12 legally sufficient reasons for rejecting the claimant's evidence;
13 (2) there are no outstanding issues that must be resolved before a
14 determination of disability can be made; and (3) it is clear from
15 the record that the ALJ would be required to find the claimant
16 disabled if he considered the claimant's evidence. *Id.*, citing *inter*
17 *alia Stewart v. Heckler*, 730 F.2d 1065, 1068 (6th Cir. 1984)

18
19 ⁴Section 4.16 of 38 C.F.R. provides for total disability based
20 upon 70%:

21
22 § 4.16 Total disability ratings for compensation based on
unemployability of the individual.

23 (a) Total disability ratings for compensation may be
24 assigned, where the schedular rating is less than total,
25 when the disabled person is, in the judgment of the rating
26 agency, unable to secure or follow a substantially gainful
27 occupation as a result of service-connected disabilities:
28 Provided that, if there is only one such disability, this
disability shall be ratable at 60 percent or more, and
that, if there are two or more disabilities, there shall
be at least one disability ratable at 40 percent or more,
and sufficient additional disability to bring the combined
rating to 70 percent or more.

(crediting VA finding of disability and awarding benefits). Here, the VA decision was supported by medical records demonstrating treatment for Meniere's and severe hearing loss in the right ear and moderate in the left during the relevant time period. (Tr. at 170-205.) These findings were confirmed by an examination by Daniel Phan, M.D., in August 1996 (not mentioned by the ALJ in his review of the medical evidence), who noted Plaintiff suffered from five to six episodes of Meniere's per year with unsuccessful treatment attempts. (Tr. at 347-351.) The episodes lasted for an average of three and up to seven days. (Tr. at 374.) During an episode, Plaintiff was unable to hear with his left ear. (Tr. at 374.) The record is fully developed⁵ and, giving great weight to the VA disability rating, a finding of disability as of October 31, 1998, is required. See *Smolen*, 80 F.3d at 1292. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 18**) is **GRANTED**. The cause is **REMANDED** for an immediate award of benefits.

2. Defendant's Motion for Summary Judgment dismissal (**Ct. Rec. 20**) is **DENIED**.

3. Any application for attorney fees shall be by separate motion.

⁵Plaintiff testified and the record supports he had back surgery in 1997 and was unable to continue his college course because he was unable to sit for extended periods. (Tr. at 279, 369.) However, the surgical records are not part of the medical file and the ALJ did not consider the residuals from the back impairment.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE